



Oregon

Theodore R. Kulongoski, Governor

Water Resources Department

North Mall Office Building
725 Summer Street NE, Suite A
Salem, OR 97301-1271
503-986-0900
FAX 503-986-0904

MEMORANDUM

TO: Water Resources Commission
FROM: Phillip C. Ward, Director
SUBJECT: Agenda Item I, June 10, 2009
Water Resources Commission Meeting

Request to Adopt Rules for the Malheur Lakes Basin Program (OAR Chapter 690, Division 512)

I. Issue Statement

The Commission is asked to adopt rules establishing reservations for multipurpose storage for future economic development in Home Creek, tributary of the Catlow Valley of the Malheur Lakes Basin. The final proposed rules are provided in Attachment 1.

II. Background

Reservations of water for multipurpose storage for future economic development are allowed by ORS 537.356. Any local government, local watershed council, or state agency or individual cooperating jointly with those entities may request that the Commission reserve unappropriated water for multipurpose storage for future economic development. Reservation requests are processed as basin program amendments through the rulemaking process.

A reservation does not establish a water right, take any lands, or change regulations for environmental protection or public health and safety. Approval of a reservation does not mean that any subsequent water right applications will be received or approved. Review of water right applications must be based on the applicable public interest review and other permitting standards at the time of the water right application.

On October 6, 2008, the Department received a request from Harney County for a reservation of 4,550 acre feet of unappropriated water for multipurpose storage for future economic development on Home Creek, tributary to the Catlow Valley in the Malheur Lakes Basin. The reservation request is provided in Attachment 2 and a map of the area is provided in Attachment 3. Harney County's reservation request stems from a Settlement Agreement resolving a number of water right protests concerning instream water right applications and storage and use of stored water. The Department has determined that quantities of unappropriated water are available for the reservations, provided that Roaring Springs Ranch withdraws its pending water right applications on Home Creek upon approval of the reservations.

III. Discussion

Rulemaking Process

On February 25, 2009, the Commission authorized initiation of the rulemaking process. Under ORS 536.300, changes to basin programs have special notice and hearing requirements. Pursuant to these requirements, the Department published notice in the Burns Times-Herald once per week for four consecutive weeks. The rulemaking was also noticed in the April 1, 2009 Secretary of State's bulletin. A rulemaking hearing was held in Burns on April 23, 2009. Commissioner Barlow served as the hearings officer. The hearing was attended by two parties: Stacy Davies, Ranch Manager for Roaring Springs Ranch, and Tim Walters, District Fish Biologist for Oregon Department of Fish and Wildlife (ODFW). Both parties gave oral testimony at the hearing. The public comment period closed on April 30, 2009. Five written comments were received and are provided in Attachment 4.

Rule Highlights:

- Eliminates reference to a division of rules that have been repealed (OAR 690, Division 11)
- Reserves 4,550 acre-feet of unappropriated water in Home Creek, tributary to Catlow Valley for multipurpose storage*
- Establishes February 25, 2009 as the priority date of applications submitted for reserved water
- Establishes consultation process with Harney County, Department of Environmental Quality (DEQ) and ODFW for applications for stored water under the reservation *
- Establishes WRD progress reports*
- Establishes 20 year time-frame for applications submitted under the reservation unless extended by the Commission*

* *stipulated by the settlement agreement*

Comments on the Hearing Draft

Roaring Springs Ranch's verbal comments expressed support for the settlement agreement. However, the Ranch Manager was concerned about the date of the priority of the reservation being junior to the instream water right.

Response

The method of determining the priority date for reservations is set in statute as the date the Commission initiates rulemaking (in this case February 25, 2009). Applicants for the use of the reserved water will have this priority date as well. So, reserved water would be junior to existing instream water rights. However, according to terms of the Settlement Agreement, the instream water right has been conditioned so it would not have priority for regulatory purposes over certain small impoundments (up to 15 acre feet with a total of 400 acre feet).

Martha Pagel on behalf of Roaring Springs Ranch and Ron Yokum on behalf of Harney County submitted written comments expressing concern that the hearing draft of the rules contained an apportionment section that is inconsistent with the Settlement Agreement.

Response

In response to those comments, and similar comments from WaterWatch and the Oregon Natural Desert Association, the apportionment language in OAR 690-512-0110 (3) is eliminated from the Final Proposed Rules.

At the rulemaking hearing, ODFW verbally commented that they are a party to the Settlement Agreement and as such have agreed to the terms the agreement. ODFW submitted written comments as well. These comments outlined ODFW management practices, recreational fisheries focus, and concerns about future applications for water right applications for Home Creek. ODFW encourages potential project proponents to contact them.

Response

The final proposed rules are consistent with ODFW comments.

Fred Ramsey of Corvallis, Oregon, provided a comment via email that Home Creek is not part of the Malheur Lake drainage. Mr. Ramsey suggested that US Fish and Wildlife Service be consulted related to any future decisions that may impact watersheds that drain into the Malheur Lake.

Response

Mr. Ramsey correctly pointed out that Home Creek is not part of the Malheur Lake drainage. However, "Malheur Lakes Basin" is an administrative boundary. The Catlow Valley is one of several adjacent basins without outlet that are included in OAR Chapter 690 Division 512 (Malheur Lakes Basin). No watersheds that drain into the Malheur Lake will be impacted by the proposed reservation.

WaterWatch of Oregon and the Oregon Natural Desert Association (ONDA) provided a comment via email. WaterWatch/ONDA did not agree to the quantity of water to be reserved during the Settlement Agreement process. While they do not object to the concept of the reservation, they are specifically concerned about the quantity of water and the method of determination. They contend that the proposed rules exceed the Commission's statutory authority. WaterWatch and ONDA further contend that the rules deviate from the Department's current methodology. They are concerned that the language as proposed in the hearing draft eliminates the ability of WaterWatch and ONDA to challenge water availability determinations in any future permitting proceeding. They contend that this is contrary to the provisions of the Settlement Agreement. They would like OAR Chapter 690 Division 33 incorporated into the rules. They suggest it would be clearer to adopt a "Home Creek Reservation" rule provisions because they are concerned that as "titled" in the hearing draft the reservation could be applied to any Malheur Lake Basin Reservation. They also wanted the application review and consultation requirements to more closely reflect the Settlement Agreement.

Response

- For the purposes of future applications for multi-purpose storage under the proposed reservation, the finding of water availability is consistent with the statute, the Settlement Agreement, and reservations in other basin programs. The reservation does not pre-approve water right applications. The final proposed rules specify that determination of water

availability shall not substitute for consideration during the public interest review of site-specific information related to the capacity of the resource to support the proposed project.

- In response to WaterWatch/ONDA comments, the proposed final rules have been renamed and re-organized. The “Home Creek Reservation” is re-titled for clarity and consistency with the Settlement Agreement.
- In response to WaterWatch/ONDA comments OAR Chapter 690 Division 512 – 100 (4) was deleted and OAR Chapter 690 Division 512 – 100 (6) was reworded to mirror the settlement agreement consultation, application, and review requirements. Other edits were made for clarity in making these adjustments. These changes also address WaterWatch/ONDA comments related to referencing OAR Chapter 690 Division 33 since it includes “all applicable rules”.

Public Interest Review

Under ORS 537.358, in adopting a rule under ORS 537.356 to reserve unappropriated water for multipurpose storage for future economic development, the Commission must include a public interest review that takes into consideration the factors described under ORS 537.170 (provided in Attachment 5).

The Department reviewed the reservation request for consistency with the public interest under the following criteria:

- (a) The reservations would reserve water for multipurpose storage for future economic development, which would allow highest use of the water for all purposes.
- (b) The reservations are for multipurpose storage for future economic development, and are therefore consistent with the maximum economic development of the waters involved.
- (c) The reservations are consistent with the control of the waters of Oregon for all beneficial purposes, including drainage, sanitation, and flood control. The reservation of water has no negative impact on such considerations.
- (d) The Department has determined that water is available for the reservations based on the Department’s estimated water availability based on an NRCS basin yield model, provided that Roaring Springs Ranch withdraws its pending protested water right applications upon approval of the reservations as requested by Harney County.
- (e) The proposed reservations are consistent with the prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved, since reservations merely reserve certain amounts of unappropriated water for future economic development. The proposed reservations do not result in approval of any water right application, and any future water right application would be subject to the applicable public interest review.
- (f) The proposed reservations would establish certain amounts of unappropriated water for future economic development with a certain priority date. Any future water right application for the use of reserved water will be processed under the applicable water rights application process, which includes provisions for the prevention of injury to all vested and inchoate rights. Any permit issued would be conditioned as necessary to protect such rights.
- (g) The reservation is consistent with state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534. ORS 536.310, (3) & (4) address several policy issues including preservation of adequate and safe water supplies and protection of such water supplies for human

consumption, while conserving maximum supplies for other beneficial uses. The statute states that multiple-purpose impoundment structures are to be preferred over single-purpose structures. The proposed reservations would reserve certain amounts of unappropriated water for future economic development, which is consistent with all of the aforementioned state water resource policies.

IV. Summary

The final proposed rules in Attachment 1 amend the Malheur Lakes Basin Program (OAR Chapter 690, Division 512) to allow the reservation requested by Harney County.

V. Alternatives

The Commission may consider the following alternative actions:

1. Adopt the final proposed rules in Attachment 1.
2. Adopt modified final proposed rules.
3. Not adopt the proposed rules and request that the Department further evaluate the issues.

VI. Recommendation

The Director recommends that the Commission adopt the final proposed rules in Attachment 1.

Attachments:

1. Final Proposed Rules
2. Harney County's Reservation Request
3. Geographic Reference Map
4. Written Comments
5. Public Interest Standards under ORS 537.170(8)

Bill Fujii

503-986-0887